No. 18443

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CLAY PRODUCTS, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT, PACIFIC CLAY PRODUCTS.

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In conformity with the designations used in the briefs on file, references in this brief to the Transcript of Record in this appeal, No. 18,443, will be designated as "NR", and references to the printed record in the prior appeal, No. 16,404, will be cited as "R".

Also, in this brief the appellant sometimes will be called "Pacific", and the appellee sometimes will be referred to as the "U.S.A."

I.

By Implication, the U. S. A. Concedes That Its Extrajudical Admissions Constitute Affirmative Evidence Requiring a Finding That the Three Clays in Dispute Are "Fire Clays."

It should be observed at the outset that the brief of the U.S.A. makes no attempt to answer subdivision 3 of division C of the "Argument" presented in the Open-

ing Brief of Pacific. Therefore, it must be assumed that the appellee concedes the point; namely, that extra-judicial admissions of the U.S.A., in the form of published Revenue Rulings, constitute affirmative evidence requiring a finding that the three clays in dispute are "fire clays".

II.

The U. S. A. Has Made a Fundamental Error in Basing Its Brief on the Premise That the District Court Applied the Definition of "Fire Clay" Established by This Court in the Prior Appeal; Whereas in Fact the District Court Erroneously Applied a New and Arbitrary Definition Devised by It.

In the Opening Brief of Appellant (pp. 27-33), Pacific demonstrated that the District Court erred as a matter of law in that it again rejected the commonly understood commercial meaning of the term "fire clay", in favor of a new and arbitrary definition of its own devising, and that the Court thereby acted in disregard of Congressional intent, the mandate of this Court, and the record.

Consequently, there is fundamental error in the Brief for the Appellee in that the entire presentation is based on the erroneous premise that the District Court applied the "standard" or definition endorsed by this Court in the prior appeal. This faulty premise vitiates the appellee's statement of the "Question Presented" (U.S.A. Br. p. 3), its "Statement" of facts (U.S.A. Br. p. 4), its "Summary of Argument" (U.S.A. Br. p. 5) and its "Argument" (U.S.A. Br. p. 6 *et seq.*).

Incidentally, Pacific pointed out in its Opening Brief (pp. 31-32) that the District Court, by its reference to

Kaolin or china clay, was attempting to apply to "refractory and fire clays" the standards applicable to an entirely different clay classification in that Kaolin or china clay is recognized as a clay separate and apart from "fire clay" by the governing statute (Section 114(b)(4)(A)(iii) of the 1939 Code), and in commercial usage [Ex. A pp. 4-6 and 8-9; Ex. B, pp. 4-6 and 7-9]. The testimony of the appellee's witness, Johnson, also recognizes the separateness of the clays in that he stated that commercially "china clay" is classed as a "white-ware" clay, whereas a refractory clay is classed as a "vitrifying" clay [R. 606].

III.

The U. S. A. Misunderstands (or Purports to Misunderstand) the Distinction Made in Riddell v. California Portland Cement Company Between the "End Use Test" (an Invalid Basis for Determining Mineral Classifications) and the "Suitabilty for Use Test" (a Valid Basis for Mineral Classification).

In *Riddell v. California Portland Cement Company,* 297 F. 2d 345 (9 Cir., 1962) at pp. 350-351, this Court pointed out that while it may be improper to classify mineral deposits in accordance with the "end use" of the mineral, nevertheless it is an entirely different and proper procedure to classify minerals in accordance with their commonly understood commercial meaning "even though the latter may be shaped and influenced, in some smaller or larger degree, by the end use". Such is the case here, where the very definition of "fire clay", which this Court approved in the prior appeal, reads in terms of "suitable refractoriness for use in commercial refractory products".

Consequently, it is surprising to find that the U.S.A. objects to testimony by Pacific's witnesses that the clays at issue were suitable for use in commercial refractory products (U.S.A Br. p. 8). And it is pertinent to note that the U.S.A. confesses that its witness, Johnson "specifically declined to adopt the end-use test as a constitutent of his testimony" (U.S.A. Br. p. 8, footnote 6). Pacific respectfully submits that this is the very factor that makes Johnson an unreliable witness—he tried to foist on the Court a "scientific" definition of "fire clay," in disregard of the commonly understood commercial meaning of the term, and in disregard of the fact that the clays at issue were "suitable—for use in commercial refractory products" (see also the discussion in the Opening Brief of Appellant in the prior appeal, No. 16404, pp. 54-67).

IV.

The Appellee's Attempt to List the Alleged "Substantial Evidence" in Support of the District Court's Determination, That the Three Clays in Issue Are Not "Fire Clays", Exposes the Error of the Trial Court's Decision.

On pages 14 and 15 of the appellee's brief it lists the so-called "substantial evidence" in support of the District Court's findings that each of the three clays in question fails to meet the A.S.T.M. definition of "fire clay". It does not require close analysis to expose the poverty of the record cited and miscited. The items will be discussed in the order stated by the U.S.A.

(a) The so-called "unimpeached opinion" of the witness Johnson, citing "R. 621".

On page 621 of the printed record in the prior appeal witness Johnson testified that the Lower Douglas

clay and the Pacific Red clay were both "brick and tile clays", and not "fire clays" because of their "high" iron content (3.38% in the case of the former, and 4.51% in the case of the latter); yet the District Court found (in both of its decisions) that both clays *are* "fire clays" [R. 876, item A; NR 14, item XVIII]. Clearly, Johnson's opinion evidence stands impeached.

Further dealing with Johnson's evidence [R. 621-622] he testified that the Upper Douglas clay was ruled out as a "fire clay" "due to its low PCE". Once again, the District Court crossed him up by determining that Upper Douglas was a "fire clay" [NR 14, item XVIII].

Johnson also testified that Valley Springs, Murphy, and Harrington Red were not "fire clays" because their PCE is too low and their iron content is too high [R. 621-622]; yet these are the self-same arguments which the Court disregarded in the cases of Pacific Red and Upper Douglas.

It must be borne in mind that Johnson had never seen, sampled, or used the Valley Springs, Murphy and Harrington Red clays [R. 615-616, 620-621, 706]; that his testimony was based on the chemical analysis shown on Exhibit 1 [R. 882]; that even Johnson admitted that based chemical analysis of the type reported in Exhibit 1, a person cannot predict the physical characteristics of a clay, nor how it will act in terms of *refractoriness,* plasticity, etc., since the rhyological characteristics are primarily due to collidal phenomena and not to chemical constitution [R. 692]. See also, in this con-

nection, Stip. par. 32 [R. 35] where the parties stated that "(i) it is understood and agreed that clays have additional characteristics not necessarily disclosed by the type of analysis set forth in Exhibit No. 1."

(b) The U.S.A. next appears to imply that the record shows that Valley Springs and Harrington Red are not "fire clays" because they are mixed with "*high* grade clays" to make fire brick (U.S.A. Br. p. 15, first two sentences). The record cited by the U.S.A. does not support the inference it makes; and the inference is contrary to the testimony that few, if any, firebrick are made from a single clay—usually a mixture of clays is used; *and, with minor exceptions, the mix would have to contain all fire clays* [R. 375-376, 406].

(c) The appellee next claims the record shows that "The existence of iron oxide exceeding two or three percent in fire clay eliminates it from refractory classification (R. 611, 789)" (U.S.A. Br. p. 15, third sentence).

It is instructive to note the exact wording of the above quotation from the appellee's brief, in the light of the record cited for it. That is, the appellee is *not* saying that clay with an iron oxide content in excess of 2 or 3% is not a fire clay; rather, the appellee is contending that a *fire clay* with an iron oxide content in excess of 2 or 3% is not in the "refractory classification".

The source of the appellee's contention is Johnson's testimony [R. 610-612] relating *only to firebrick used*

in the "Dutch oven" or firing section of a furnace or boiler. Johnson testified that the presence of excess iron in the *fire clay* will eliminate the use of that clay in *firebrick* designed for use in the firing section of an oven or boiler.

Assuming, without conceding, that Johnson is correct on this phase of the matter; the fact remains that the clay is still a *fire clay* even though it may contain "excess iron"; and since firebrick is only one of the many types of commercial refractory products (see division B on pp. 14 and 15 of the Opening Brief of Appellant), the clay is still suitable for use in commercial refractory products.

The other portion of the record cited by appellee [R. 789] does not support his contention, for there witness Mays testified that his Valley Springs clay was a fire clay; a very plastic clay with a comparatively high PCE of 20; but that it was not as high a grade of fire clay as the Lincoln and Ione fire clays because there is "too much iron in it". In short, Mays testified that a clay with "too much iron in it" was still a fire clay.

In addition to the foregoing, the record amply demonstrates that a clay with an iron oxide content in excess of 2 or 3% can still be a "fire clay". For example:

(1) The parties stipulated that South Pit Red and South Pit White are "refractory and fire clays" [Stip. par. 20; R. 28]; and each of these clays has an iron oxide content in excess of 3% [Ex. 1; R. 882].

(2) The District Court determined that Lower Douglas and Pacific Red are "fire clays" [NR 14, par. XVIII]; and both of these have an iron oxide content in excess of 3% [Ex. 1; R. 882].

(3) And the District Court found that Upper Douglas, with an iron oxide content of 2.52% [Ex. 1; R. 882] was a "fire clay" [NR 14, par. XVIII].

(d) The U.S.A. next contends that the record shows that the aluminum content of the three clays in issue is too low in relation to "impurities"; and, in the process, appellee makes the inexcusable error of stating that "excess silica" is an "impurity" (U.S.A. Br. p. 15), despite the fact that the controlling definition of "fire clay" approved by this Court, defines "fire clay" in terms of the "essential constituent hydrous silicates of aluminum with or without free silica."

In typical analysis of fire clays, silica ranges from 46 to 81% and alumina ranges from 12 to 36%, and the silica and alumina content of the three clays at issue are well within these ranges [Ex. 12, p. 145; R. 172-173, 882; Ex. 1]. See also the testimony of the appellee's witness Johnson [R. 691]:

> "No, Siree, the amount of silica in a clay, whether it is combined or uncombined, doesn't make any differenct. Silica of itself is an extremely refractory material. In other words, it has a fusion point much higher than clay."

(e) The U.S.A. next claims (erroneously) that the A.S.T.M. definition requires that a "fire clay" must

have a "relatively high" degree of plasticity. In fact, the definition simply requires that the clay be "plastic when sufficiently pulverized and wetted", and as appellee's own witness, Johnson, testified [R. 673]:

> "If it is a clay, normally it is plastic or can be made plastic."

There is nothing in the record supporting the appellee's claim that a fire clay has to have a relatively high degree of plasticity; and, in fact, some of the best fire clays are weakly plastic—see, for example, the definition of "flint fire clay", in Exhibit 2 [p. 771 of the Exhibit].

(f) Lastly, the U.S.A. claims that the record is "replete" with evidence that the minimum PCE of a "fire clay" is Cone 19; yet it is obvious that the District Court did not accept this evidence as convincing since it decided that Upper Douglas with a PCE of 16, was a "fire clay" [NR 14, par. XVIII].

In view of the foregoing discussion it seems obvious that the appellee's attempt (on pages 14 and 15 of its brief) to demonstrate that the "record contains substantial evidence to support the lower court's finding", simply cannot withstand analysis; and that such analysis discloses that the District Court's findings (with respect to the three clays in issue) were unsupported by the record, and are clearly erroneous.

V.

Conclusion.

On the basis of the record and the arguments developed herein, Pacific prays the Court to proceed as requested in its Opening Brief, namely:

(a) Reverse the decision of the District Court to the extent that it determined that the clays Murphy, Valley Springs and Harrington Red are not refractory and fire clays.

(b) Remand the cause to the District Court for a redetermination of the amounts refundable to Pacific, consistent with the view that the three named clays *are* refractory and fire clays.

Respectfully submitted,

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Pacific Clay Products.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRISON HARKINS